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PP

v.

TANG SIEW YEW & ORS

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HIGH COURT SABAH & SARAWAK, SIBU
HAMID SULTAN ABU BACKER JC
[CRIMINAL APPLICATION NO: 44-3-2008]
31 DECEMBER 2008

C ***CRIMINAL PROCEDURE:*** *Appeal - Reinstatement - Application by prosecution - Whether there was contumelious delay by prosecution to appear on hearing dates of appeal - Criminal Procedure Code, s. 313*

D This was the prosecution's application to reinstate its appeal no 41-15-2007 which was struck out on the ground that the Deputy Public Prosecutor ('DPP') in charge failed to attend the final date of hearing of the appeal.

Held (dismissing the application):

E **(1)** There was a contumelious delay on the part of the applicant. The DPP did not appear on various dates of the hearing of the appeal, on the date of submission and also did not file in the written submission as directed by the court. Contumelious conduct of the applicant does not warrant the exercise of the F discretion in favour of the applicant and more so when the conduct has not been adequately explained in the supporting affidavit. (para 11)

(2) The court is empowered under s. 313 of the Criminal G Procedure Code to strike out the appeal if the appellant does not appear. This drastic step will not be ordinarily exercised without giving ample opportunity for the appellant to prosecute the appeal. That was done in the present case. The applicant herein failed to comply with the orders of the court and the H DPP in charge of the appeal also failed to appear on several occasions. (para 11)

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Case(s) referred to:

Hamid Hj Takip v. PP (Criminal Application No: Q-07-9-079) (Unreported) ***(refd)***

Hayati Aizan v. PP [1999] 4 CLJ 697 HC ***(refd)***

Julai Spawi v. PP (Kuching High Court Criminal Appeal No: 42-6-2007-III9) (Unreported) ***(refd)***

PP v. Utrakumaran Samivel [2007] 7 CLJ 124 HC ***(refd)***

Rahim Usoff & Ors v. PP [1984] 2 CLJ 121; [1984] 2 CLJ (Rep) 439 HC ***(refd)***

The New India Assurance Co Ltd v. Karam Singh [1972] 2 MLJ 26 ***(refd)***

Legislation referred to:

Criminal Procedure Code, ss. 310, 313

For the accused/1st respondent - Dr Chew Peng Hui; M/s Battenberg & Talma Advocates

For the accused/3rd respondent - Paul Liong Yah; M/s Liong & Co

For the prosecution - Musli Ab Hamid DPP

Reported by Usha Thiagarajah

JUDGMENT

Hamid Sultan Abu Backer JC:

[1] This is my judgment in respect of prosecution's application to reinstate the appeal No: 41-15-2007 which was struck out on the ground that the deputy prosecutor did not attend on 9 October 2008, the final date of hearing of appeal.

[2] The learned deputy public prosecutor says that the application is made pursuant to s. 310 of the Criminal Procedure Code (CPC) which reads as follows:

> A Judge may, on the application of any person desirous of appealing who may be debarred from so doing upon the ground of his not having observed some formality or some requirement of this Code, permit an appeal upon such terms and with such directions to the Magistrate and to the parties as the Judge shall consider desirable, in order that substantial justice may be done in the matter.

A **Brief Facts**

[3] The appeal which was filed on 12 October 2007 came for hearing on several dates. On 24 September 2008 a final adjournment was given for parties to submit on or before 6 October
B 2008.

[4] On various occasions the appeal came up for hearing, the deputy public prosecutor in charge of the file did not appear. On 9 October 2008 when the matter came up, the DPP, had not filed the submission despite having been ordered to do so but the
C respondents had filed the submission. In addition as the DPP did not appear and had shown disinterestedness in the appeal, the appeal was struck out.

[5] The learned deputy public prosecutor says that the court
D cannot strike out the appeal without hearing the merit. The respondents oppose the application.

Arguments

[6] Learned counsel for the 1st respondent says the appeal had
E been rightly struck out pursuant to s. 313 of Criminal Procedure Code (CPC) which reads as follows:

> (i) When the appeal comes on for hearing the appellant, if present, shall be first heard in support of the appeal, the
F respondent if present, shall be heard against it, and the appellant shall be entitled to reply.
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> (ii) If the appellant does not appear to support his appeal the Court may consider his appeal and may make such order thereon as it thinks fit: Provided that the Court may refuse
G to consider the appeal or to make any such order in the case of an appellant who is out of the jurisdiction or who does not appear personally before the Court in pursuance of a condition upon which he was admitted to bail, except on such terms as it thinks fit to impose.

H and that the appellant's absence on 9 October 2008 is a contumelious conduct as the court had on 24 September 2008 ordered the adjournment to be final. In addition he also says that the court can strike out the appeal without considering the merit
I of the appeal. And relies on two cases namely:

(a) *Rahim Usoff & Ors v. PP* [1984] 2 CLJ 121; [1984] 2 CLJ (Rep) 439 where the court in regard to the appellant who was absent the court directed that it will in the circumstances refuse to consider the appeal further and order that the appeal be dismissed.

(b) *Hayati Aizan v. Public Prosecutor* [1999] 4 CLJ 697 where the court held:

(i) Section 313(ii) CPC has two parts, ie, the enacting part and the proviso. The enacting part provides a general rule that the court may entertain an appeal when the appellant is not present. This part, however, is circumscribed by the proviso. In the circumstances enumerated in the proviso, the court may refuse to consider the appeal except on such terms as it thinks fit to impose.

(ii) The use of the word "except" in the proviso means that the imposition of the terms referred to therein is discretionary. Thus, the court may consider the appeal as provided in. the proviso only if it fixes any terms as it thinks fit to impose. If the court does not fix any terms, as for example by not granting an adjournment, then it cannot consider the appeal with the result that the appeal must be dismissed.

(iii) The appellant had failed to appear personally in court on five occasions in pursuance of a condition upon which she was admitted to bail. That being so, it is an abuse of the process of the court to adjourn the hearing of the appeal any further. The discretion must be exercised in favour of the application made by the prosecution to dismiss the appeal.

[7] In addition, the learned counsel says that the court is *'functus officio'* and the proper procedure is for the appellant to appeal against the striking out order as the Criminal Procedure Code does not provide for reinstatement of appeal and relies on the case of *The New India Assurance Co. Ltd. v. Karam Singh* [1972] 2 MLJ 26 and the case of *PP v. Utrakumaran Samivel* [2007] 7 CLJ 124 where an application to reinstate a criminal appeal which was struck out was not allowed. Azahar Mohamed J opined:

(i) The factual circumstances in the instant case clearly indicated that the order of the learned judge dated 22 June 2005 was a final order in the sense that it was final in its effect. It was obvious that the order finally disposed of the rights of the parties. Hence, the matter had been concluded and the

A appeal was no longer before this court. An important point to note was the learned DPP had been heard during the hearing of the criminal appeal on 22 June 2005. It was doubtful that this court had no jurisdiction to modify or alter that order. This matter should not be re-litigated before the same court Any party aggrieved by that order should appeal and the higher court should deal with the matter.

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(ii) Applying the principle enunciated in that case, it is my judgment that the striking out order of 22 June 2005 is a 'decision' within the meaning of that word in s. 3 of the CJA for the reason that such a decision does have the effect of finally determining the rights of the Public Prosecutor since it determines conclusively the principal matter in question in the said criminal appeal. In my view, the order made by the learned judge was not a procedural ruling and that it was a final order and therefore appealable under s. 50 of the CJA. It is for that reason, in my view that the proper cause of action to be taken by the Public Prosecutor aggrieved by the order of 22 June 2005, in the circumstances of this case, was by way of an appeal to the Court of Appeal against that order and not by filing the present application to reinstate it.

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[8] Finally the learned counsel says that the appellant has failed to explain the contumelious delay in their supporting affidavit. In consequence, there is no material to exercise discretion to reinstate the case.

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[9] The learned counsel for the 3rd respondent has also submitted on similar lines.

Applicants Argument

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[10] The learned DPP in a robust manner says as follows:

> The applicant also wish to submit that; any appeal by the appellant cannot simply be struck out or dismissed without hearing the argument or submission of the said appellant. The applicant also submit that; the appeal of the appellant cannot be dismissed or struck out by reason of non attendance of the appellant at the hearing date which had been fixed by the honourable court.

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And relies on two cases which are stated below:

(i) *Hamid Haji Takip v. Public Prosecutor* (Criminal Application No: Q-07-9-079) (CA) where the learned DPP without furnishing a copy of the authority to court as well as the respondents

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despite having been directed by the court says that the judge had held that the appellants' appeal cannot simply by reason of non-attendance of the appellant to argue his appeal be dismissed.

(ii) And *Julai Spawi v. Public Prosecutor* (Kuching High Court Criminal Appeal No: 42-6-2007-III9) (CA) without furnishing the authority the learned DPP submits as follows:

> In this case, the appellant was convicted and sentenced to 7 years imprisonment and stay of execution had been granted pending his appeal. However, the appellant never turn up to argue his case during the hearing date which had been postponed several times to wait for his attendance. At the final date of the hearing which had been fixed; the appellant failed to attend the hearing and the Deputy Public Prosecutor applied for the appellant's appeal to be dismissed. However, the learned Judge held that; the appellant's appeal cannot be dismissed simply because he did not attend the court to argue his case. The only thing that court can do is to set aside the order for stay of execution granted.
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> The only question here; does the same principle applies when the appellant is the State? To deal with this issue; the applicant submits that; Article 8 of the Federal Constitution states that; All persons are equal before the law and entitled to the equal protection of the law. The applicant submits that; the State in the present case is representing the people in Sarawak in general and in particular, the people at Ulu Lanang, Sibu. The ecosystem of the area of these people needs to be protected. Most of the people still rely on the river for their daily life either for their daily usage or for their income as small fishermen. If the said river had been destroyed to get the profit from it's sand, the people nearby will suffer lost of small income and resource of clean water for their daily usage.

[11] I have read the notice of motion, affidavits and the submission of the parties in detail. I take the view that the notice of motion must be dismissed. My reasons are as follows:

(a) I agree with the respondents that there was a contumelious delay on the part of the applicant, the DPP in charge did not appear on various dates of the hearing of appeal, on the date of submission and also did not file in the written submission

even though directed by the court. Contumelious conduct of the applicant does not warrant the exercise of the discretion in favour of the applicant and more so the conduct has not been adequately explained in the supporting affidavit.

(b) It is beyond doubt that the court is empowered under s. 313 of the Criminal Procedure Code to strike out the appeal if the appellant does not appear. This drastic step will not be ordinarily exercised without giving ample opportunity for the appellant to prosecute the appeal. This was done in this case. In this case the applicant has failed to comply with the orders of the court and the DPP in charge of the appeal has also failed to appear on several occasions.

[12] For reasons stated above, I dismiss the notice of motion.